IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 19, 2009

STATE OF TENNESSEE v. MARK W. WHITTAKER

Direct Appeal from the Criminal Court for Putnam County
No. 06-0619 David Paterson, Judge

No. M2008-02859-CCA-R3-CD - Filed March 2, 2010

A Putnam County jury convicted the Defendant, Mark W. Whittaker, of felony failure to appear, and the trial court sentenced him to two years, with forty-one days to be served in the county jail, and the remainder to be served on probation. On appeal, the Defendant contends: (1) the evidence is insufficient to sustain his conviction; and (2) the trial court erred when it denied his motion to dismiss based on double jeopardy. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Allison M. Rasbury (at trial and on appeal) and E.J. Mackie (at trial), Cookeville, Tennessee, for the Appellant, Mark W. Whittaker.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; Randy York, District Attorney General; Beth Willis, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant's April 28, 2006, court date to address DUI charges, at which the State alleged he did not appear. A Putnam County grand jury indicted him for felony failure to appear for the April 28, 2006, court date. At his trial on this charge, the following evidence was presented: Dana Smith, with Freebird Bonding Company, testified that she wrote bonds and handled other administrative tasks for the company. She

said that normally after a defendant contacts her company seeking their services, someone from her company reviews with the defendant the paperwork, which includes three carbon copies, white, yellow, and pink. Smith said that the paperwork, a copy of which is given to the defendant, reflects the defendant's court date, informs him that he must be at the courthouse at 9:00 a.m. on the day of court, and shows the bond amount for which the defendant is responsible.

Smith testified that on February 17, 2006, she met with the Defendant in the bonding room of the jail, helped him fill out an application, and reviewed his paperwork with him. This included the portion of the paperwork called a "release," in which the Defendant agreed to give the bonding company access to his records, including medical and employment records, in the event that he failed to appear for his court appearance. After reviewing this paperwork, Smith retained a copy of all the paperwork in a file in her bonding office.

Smith identified a copy of the application she reviewed with the Defendant, saying that it showed that the bonding company provided him with a thousand dollar bond for each of his two charges, DUI and driving on a revoked license. The paperwork listed the Defendant's court date as April 28, 2006, and stated the Defendant should be present at 9:00 a.m. on that day.

Smith identified two other documents, which were the Defendant's appearance bonds. The documents listed the Defendant's name, the amount of his bond, his court date, and the time that he needed to appear. Both documents listed the Defendant's court date as April 28, 2006. She said she told the Defendant where to appear for court. Each bond reflected the Defendant's signature, address, social security number, and date of birth. Smith said the Defendant understood that his court date was scheduled for April 28, 2006. Smith testified that, if the Defendant did not show up for the scheduled court appearance, the company would be responsible for paying the entire two thousand dollar bond. Smith testified that if the Defendant failed to appear for court, the company would file an indictment against the Defendant and attempt to find him.

On cross-examination, Smith testified that she had a contract with the Defendant and that his failure to appear was a breach of that contract. Smith said that either she or a co-worker would have been in court on April 28, 2006, to ensure that each defendant with whom her company had contracted appeared in court. She said she did not specifically recall the Defendant's name being called in court on April 28, 2006.

Linda Pippin testified she worked in the Criminal Court Clerk's Office as a Deputy Clerk in the State Trooper's tickets division. She said she prepared a docket to be called on April 28, 2006. Pippin identified the April 28, 2006, docket and confirmed that the

Defendant's name was listed thereon. Pippin said the Defendant did not respond when the general sessions judge called his name in court.

Pippin explained that, when a defendant does not appear in court, the judge orders that a capias and a "sci. fa."[1] be issued. The capias is sent to the Sheriff's Department, telling the department to arrest the defendant, and the "sci. fa." goes to the bonding company, giving the bonding company 180 days to surrender the defendant to jail and secure his appearance at another court date. Pippin testified that if the defendant does not appear within the 180-day time period, the bonding company must pay the entire bond amount.

Pippin identified the capias she prepared for the Defendant, saying that it was prepared April 28, 2006, but not issued until May 8, 2006. She explained the delay in issuing the capias was due to the trial judge's policy of waiting a week before issuing a capias in case a defendant called soon after his missed court date to explain his failure to appear. She said the Defendant never called to explain his absence, so the clerk's office filed his capias. Pippin identified the clerk's office's copy of the Defendant's appearance bond. She said both the capias and the appearance bond listed the Defendant's court date as April 28, 2006.

On cross-examination, Pippin testified that she assumed the Defendant's name was called because his name was on the docket but that she did not independently recall his name being called.

Arnold Allen testified that he worked at Freebird Bail Bonds, where one of his responsibilities was attempting to locate people after they missed a court date. He attempted to contact the Defendant several times and spoke with him on the phone over one hundred and fifty times. Allen testified that the Defendant's application with the bail bonds company listed his address as Burgess School Road. Allen went to the address, which appeared abandoned, five or six times to look for the Defendant without success. Allen testified that he used the Defendant's social security number to attempt to find him and discovered that he had twenty-five listed addresses, including one in California and one in Alaska. Allen located the Defendant in Virginia and went with another person to get the Defendant. When they arrived, the Defendant locked himself in the house and would not come out. Allen enlisted law enforcement to assist in getting the Defendant out of his house. Allen said he asked the Defendant several times to turn himself in, but the Defendant refused.

The Defendant testified that he had been scheduled for more than twenty court dates

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[1] "Sci. fa." is an abbreviated version of *scire facias*, meaning "a writ requiring the person against whom it is issued to appear and show cause why some matter should not be annulled or vacated, or why a dormant judgment against that person should not be revived." Black's Law Dictionary (8th Ed. 2004).

and that he was present for each. He said he traveled from Alaska, California, and Virginia to be present in court. The Defendant recalled that, during one court date in September, he became ill and "got sick on" himself, so he left. Another time, he traveled from Alaska but arrived late because his flight had been held over. He said he contacted the court to inform the court of the reason for his delay.

The Defendant said he called the court clerk about his April 28, 2006, court date, and the clerk said he was not on the docket, but she told him to appear in court anyway. When he arrived, his name was never called, so he went home.

On cross-examination, the Defendant testified that he always appeared for his court dates, and that no other capias had been issued for him. The Defendant estimated he was present in court for three or four hours on April 28, when his name was not called. The Defendant said he moved from his Burgess Road address approximately six weeks after his court date. He denied that anyone from the bonding company came to his home looking for him. He clarified that he learned that people from the bonding company came with guns drawn to his cousin's home, located on the same piece of property as the home in which he had lived. He did not, however, turn himself in to the police after this incident.

The Defendant said he moved to Virginia, despite his three pending charges, because he believed his charges may have been dismissed because his name had not been called on the docket. He acknowledged that he never heard the judge or the district attorney announce that the charges were dismissed. The Defendant said that, when he learned from Arnold that there was a warrant for his arrest, he went to the police station in Virginia Beach to turn himself in and was informed that the Virginia Beach police did not have a warrant for his arrest.

The State asked the Defendant whether he was sentenced on a capias by the general sessions judge to do ten days in jail, and the Defendant said, "Yes, and I served my time for the failure to appear and I feel like I'm back here for the same thing, I've already served . . . ."

Marcia Borys, the Clerk of Putnam County, testified that a capias was issued for the Defendant on November 21, 2007, for his failure to appear. The bonding company involved was Sparta Bonding Company. The Defendant had failed to appear in another case that included a DUI, driving on a revoked license, and a violation of the open container law.

The Defendant testified again, explaining that he did not appear on November 21, 2007, because he was traveling from Alaska, and his flight had been held over. He said that he called the court at 8:30 a.m. to say he was going to be late and that traffic then further

delayed him. He said he explained this to the court, and the capias was lifted.

Based upon this evidence, the jury convicted the Defendant of one count of felony failure to appear.

II. Analysis

On appeal, the Defendant contends: (1) the evidence is insufficient to sustain his conviction; and (2) the trial court erred when it denied his motion to dismiss based on double jeopardy.

A. Sufficiency of the Evidence

The Defendant asserts that the evidence presented is insufficient to sustain his conviction. The State counters that this case involves a question of credibility of the witnesses, and the jury accredited the testimony of the State's witnesses.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted). In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the

State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of a violation of Tennessee Code Annotated section 39-16-609, which provides that "[i]t is unlawful for any person to knowingly fail to appear as directed by a lawful authority if the person . . . [h]as been lawfully released from custody, with or without bail, on condition of subsequent appearance at an official proceeding . . . at a specified time or place[.]" T.C.A. § 39-16-609(a)(4) (2006). The statute further provides: "It is a defense to prosecution under this section that . . . [t]he person had a reasonable excuse for failure to appear at the specified time and place." T.C.A. § 39-16-609(b)(2).

To convict the Defendant of failure to appear, the jury was required to find beyond a reasonable doubt that (1) he knowingly failed to appear at an official proceeding, (2) he was directed to appear by a lawful authority, and (3) he was "lawfully released from custody, with or without bail, on condition of subsequent appearance at an official proceeding . . . at a specified time or place." T.C.A. § 39-16-609(a)(4); *see also State v. Don Wayne Williams*, No. W2009-00024-CCA-R3-CD, 2009 WL 3103824, at *1 (Tenn. Crim. App., at Jackson, Sept. 28, 2009) (citing *State v. Edward Talmadge McConnell*, No. E1998-00288-CCA-R3-CD, 2000 WL 688588, at *6 (Tenn. Crim. App., at Knoxville, May 30, 2000), *perm. to app. denied* (Tenn. Jan. 8, 2001)), *no Tenn. R. App. P. 11 application filed*.

In the case under submission, the evidence viewed in the light most favorable to the State proves that the Defendant was aware of his April 28, 2006, court date. He was listed

on the April 28 docket, and it is the practice of the court to call each name on the docket. The trial court issued a capias when the defendant did not respond to his name being called or call the court clerk to explain his absence. The bail bond company was unable to contact the Defendant. The Defendant admits that, although he knew the bail bond company was looking for him, he did not contact the company. He explained that, because he believed the charges against him may have been dismissed, he instead moved to Virginia. The Defendant testified he was present in court on April 28, 2006, but his name was never called. The Defendant, however, never alerted a court officer or someone from the bonding company that his name was not called, and never contacted the court clerk after his court date. The jury was entitled to credit the testimony of the State's witnesses that the Defendant's name was on the docket for April 28,2006, and would have been called in court. "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *Bland*, 958 S.W.2d at 659. We conclude that the State's witnesses provided sufficient evidence to establish the Defendant's knowing failure to appear for his scheduled court date.

B. Double Jeopardy

The Defendant next contends that his conviction violates double jeopardy because he has already served a ten-day jail sentence for being found in contempt of court after he failed to appear for his April 28, 2006, court date. He asserts that the felony failure to appear prosecution that occurred after he had already been found in contempt of court for failing to appear, violated his right against double jeopardy. The State counters that criminal contempt and felony failure to appear are distinct offenses that allow for separate prosecutions.

After a thorough review of the record, we note only one reference to the Defendant's having served ten days in jail for being in contempt of court: when the State's attorney asked the Defendant whether he was sentenced on a capias by the General Sessions Judge to do ten days in jail, the Defendant said, "Yes, and I served my time for the failure to appear and I feel like I'm back here for the same thing, I've already served . . . ." Other than the Defendant's bare allegation, there is no evidence that the Defendant was, in fact, found in contempt for his failure to appear at the April 28, 2006, court date. There is no order reflecting any finding of contempt by the general sessions court or any mention of such finding in the presentence report.

It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). We conclude that the Defendant has not provided this Court a complete account of

what transpired with respect to his claim that he served ten days in jail for contempt. As such, we cannot review whether any such finding of contempt by the general sessions court would render his conviction in this case a violation of the double jeopardy clause. The Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE